No. 12121

In The United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant*,

vs.

BENJAMIN W. MCNAIR, *Appellee*.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION
HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

BASSETT & GEISNESS,
Proctors for Appellee.
811 New World Life Building,
Seattle 4, Washington.

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BRIEF OF APPELLEE

SUMMARY OF ARGUMENT

Appellee is entitled to benefits if disabled from working in the occupation in which he was engaged at the time of injury. The proof shows that such disability existed until August 15, 1947. During that period appellee could do light work, but he tried and found himself unable to perform the usual duties of his occupation at the time of injury. The trial court did not err in allowing benefits until March 2, 1946, but should have allowed benefits for the further period from March 2, 1946, to August 15, 1947.

ARGUMENT

Applicable Clause of Policy

One clause of the policy sued upon, set forth in full in the appendix to appellant's brief, provides for benefits in the event of "incapacity because of injury * * *

which necessarily and continuously prevents the insured from performing any and every kind of duty pertaining to his occupation at the time of injury." This is the clause under which the trial court made its award.

Another clause of the policy provides for benefits in the event of disability from "performing for remuneration or benefit, any work or engaging in any business or occupation." In the latter case the rate of payments are the same but the maximum total amount is then $7500.00 instead of $5000.00. Both of these provisions are contained in Article XII(A) of the policy (Appellant's brief, Appendix IX, *et seq.*).

INTERPRETATION OF POLICY

The Second Seamen's War Risk Policy sued upon here is to be liberally interpreted in favor of the seaman, *Daranovich v. U.S.*, 73 Fed. Supp. 1004 (D.C., N.Y. 1947);*Sutton v. U.S.*, 73 Fed. Supp. 996 (D.C., Cal. 1947). The last case cites *Straw v. U.S.*, 62 F. (2d) 757 (C.C.A. 9, 1933) and *U.S. v. Patryas*, 303 U.S. 341, 58 S. Ct. 551, 82 L. ed. 883 (C.C.A. 9, 1938).

EVIDENCE AS TO DISABILITY

Appellee called Dr. Hunter J. McKay, a highly trained neuro-surgeon, formerly with the Mayo Clinic (Aps. 26). Doctor McKay testified that he examined appellee August 15, 1947 (Aps. 26). At that time appellee complained that following his shrapnel wound he developed a pain at about the site of the entrance of the shrapnel and that this was aggravated by any type of strain, such as lifting, pulling, etc. Examina-

tion disclosed that there was injury to the brachial plexus (Aps. 28). X-rays showed that the shrapnel had necessarily damaged it (Aps. 29). The brachial plexus consists of a number of nerves that have come from the spinal cord into the neck region and function to ennervate the arm (Aps. 28). The plexus is the junction point of the nerves at the base and side of the neck, and from the plexus the nerves ramify down the arm (Aps. 27 and 29). The injury to the plexus was evidenced by an appreciable diminution of the reflexes in certain of the muscle groups and by patchy loss of sensation throughout the arm. The reflex of the triceps muscle in the forearm was virtually absent (Aps. 28). At that time the doctor was of the opinion that appellee had sustained a definite injury to his brachial plexus (Aps. 30).

The injury handicapped appellee for physical labor. This handicap would be evidenced in any activity that caused him to strain the muscles of the right shoulder or the right arm. This would cause pain. In addition, there was a slight diminution of strength in the entire right arm and the motor function being impaired by the injury to the brachial plexus, his dexterity in use of his right arm was impaired (Aps. 32). His right arm is his major arm (Aps. 52). At that time (August 15, 1947) appellee could have engaged in hard manual labor only "with extreme difficulty and suffering" (Aps. 32).

At the time of this first examination, August 15, 1947, Doctor McKay believed that there was no definite treatment indicated and that the condition might improve or that it might get worse (Aps. 32-33). Doc-

tor McKay saw appellee again on April 19, 1948, the day before the trial commenced. He found that the condition had fortunately improved and that the impairment of reflexes and strength had virtually disappeared and that there was no present evidence of muscle shrinkage. The former impairment of muscle sensation was also much improved (Aps. 33).

The doctor said that the condition of appellee's reflexes in August, 1947, is something that can be objectively determined so the doctor need not rely entirely on the patient's statements to him (Aps. 33). As stated by appellant, Doctor McKay estimated the permanent partial disability as 10% of the disability resulting from amputation of the arm at the shoulder (Aps. 35) and appellant does not question the award based on that estimate.

At the time of the trial the piece of shrapnel was still embedded in the soft tissues of appellee's shoulder but the doctor did not believe that it should be removed (Aps. 40).

At the time of his injury appellee was a fireman and water-tender on a merchant ship. He was 21 years of age at the time of trial (Aps. 47). On December 28, 1944, a suicide plane dove into his ship and he sustained the wound in question (Aps. 47-48). Appellee's arm was at first very numb so that he could not even lift it or manipulate it. As time went on he regained use of his arm but continued to have trouble mostly "in lifting or—well, it was just in general work that I had trouble with it" (Aps. 50-51).

Because of the trouble he had with his arm, appellee

went to the Marine Hospital on April 9, 1945 and was treated as an out-patient until May 22, 1945 (Aps. 50). Appellee had returned to the United States March 2, 1945 (Aps. 49) and between that time and the time he reported to the Marine Hospital he attempted to do some gardening and orchard work for hire but "it was just a little too much for my arm" (Aps. 52).

On August 13, 1945 appellee obtained a job on the S.S. TOLOA as oiler in the engine room (Aps. 53-54). He voluntarily left the work because it was too much for him (Aps. 54). There was some confusion as to the period of service on the TOLOA but he evidently was on the ship more or less continuously from August 13, 1945 until December 24, 1945 and sometime in January and February, 1946 (Aps. 91-92), probably from January 10th until February 28, 1946 (Aps. 84).

He thereafter sought and obtained employment as a waiter on the S.S. BARANOF and made one trip to Alaska working in that capacity (Aps. 55); this trip took about 27 or 28 days (Aps. 56).

Appellee testified as follows (Aps. 56):

> Q. (By Mr. Geisness): Since you left the BARRANOFF, have you ever again gone to sea?
>
> A. No, sir.
>
> Q. Why is that?
>
> A. Well, sir, I tried it that last time and I just decided to give it up.
>
> Q. Why did you decide to give it up?
>
> A. Because I couldn't stand my own job in the engine room, because I belonged to the black gang

in the first place and that BARRANOFF job was a temporary job.

Q. Did you have the proper papers to continue the job like you had on the BARRANOFF?

A. No, sir.

Q. Why couldn't you go back on the black gang and do blackgang work?

A. Like I told you, it was just too much heavy work."

About a month or so after appellee left the BARANOF, he helped his father and brother around home and with mechanical work and he tried apple picking in September, 1947 but even at that late date he was required to leave because carrying a heavy sack around his neck gave him quite a bit of trouble (Aps. 56-57).

This, the proof shows that "black gang" work is heavy work, appellee tried it and found that he could not carry it on and Doctor McKay testified that in August 15, 1947 appellee was not able to carry on heavy work.

APPELLEE WAS DISABLED UNTIL AUGUST 15, 1947 FROM PERFORMING "ANY AND EVERY KIND OF DUTY PERTAINING TO HIS OCCUPATION" UNDER APPLICABLE LEGAL TESTS.

The governing legal tests are well stated in 29 Am. Jur. Sec. 1161, page 872:

> "The rule prevailing in most jurisdictions is that the 'total disability' contemplated by a sickness or accident insurance policy, or the disability clause of a life insurance policy, does not mean,

as its literal construction would require, a state of absolute helplessness, but contemplates rather such a disability as renders the insured unable to perform all the substantial and material acts necessary to the prosecution of his business or occupation in a customary and usual manner. The fact that the insured is able to perform some inconsequential, trivial, or incidental duties connected with his usual employment or occupation does not preclude recovery under a total disability provision; neither does the fact that the insured may be able for an inappreciable period of time to perform his accustomed labor prevent a recovery, where he is actually totally disabled from following any avocation. Nor do futile attempts to carry on one's business or occupation disprove total disability. Furthermore, if, by reason of an injury insured against, the insured actually loses time from his business, he is entitled to recover the money value thereof, although his salary is continued during his disability, where, under the policy, he has a right to be indemnified against the loss of the money value of his time during disability arising from accident; the indemnity is against loss of earning power and not against loss of income.

"As a corollary or extension of the foregoing general rule, the view is taken in some cases that disability to substantially perform the duties of the insured's occupation, or an illness which, in the exercise of common care and prudence, requires him to desist in order that a cure may be effected, is 'total disability', and the fact that the insured may or did do some work or transact some business duties does not preclude the existence of total disability at the time, if reasonable

care and prudence require that he desist, or if he in fact is totally unfit to work."

Under the foregoing tests we respectfully submit that appellee was not only disabled to March 2, 1945, the date established by the trial court as the termination of disability but was disabled up until the time Doctor McKay examined him in August, 1947.

Appellant's argument really boils down to the contention that appellee could not have been disabled from "black gang" work because he actually engaged in that work for a period of several months. However, as indicated in the foregoing quotation from American Jurisprudence the fact that he actually engaged in the work is not conclusive. Here he finally had to give it up.

The rule is stated in *Mutual Life Insurance Co. v. Brunson*, 20 So.(2d) 214 (Ala. 1944):

> "But if he received compensation for work which he did not perform or which he performed in a way which did not justify the compensation he received or any other substantial sum, it cannot be said that he was substantially performing the material duties of a gainful occupation. Or if he had not the physical or mental ability to carry on a gainful occupation in its substantial features with the skill and accuracy which such business required in the usual and customary manner, his attempt to do so for compensation and his continuing effort at it is not conclusive that he was not totally disabled."

An apt comment is quoted in *Seaman v. New York Life Insurance Co.*, 115 P.(2d) 1005 (Mont. 1941):

> " 'The rule is well established that 'total dis-

> ability' within the meaning of insurance policies does not necessarily mean utter helplessness, nor inability to perform any task, or even on some occasions, usual tasks for a limited period. * * * To hold otherwise would be to penalize every effort of an injured or sick person to rehabilitate himself and thus incidentally relieve the insurance carrier.' "

It is well established, as indicated by the foregoing, that an insured is not precluded from recovering because he actually engaged in his occupation if common care and prudence required him to do otherwise (*Wright v. Prudential Insurance Co.*, 80 P.(2d) 752, (Cal. 1938) and authorities cited). And the same thing should certainly be true where pain does not reasonably permit work actually attempted and temporarily performed. Here, appellee was disabled by pain and weakness.

One of our Washington cases has been cited many times and contains probably as good a definition of total disability to engage in *any* occupation as may be found anywhere. In this case, *Storwick v. Reliance Life Insurance Co.*, 151 Wash. 153, the court said:

> "It seems to us that one is totally disabled, within the meaning of these policies, when he is so far disabled that he cannot, with any degree of success, within the range of his normal capabilities, earn wages or benefit in some occupation or gainful pursuit."

Under this definition a person is disabled when he can only work occasionally or intermittently and his capacity is much limited, *Kuhnle v. Department of Labor & Industries*, 12 Wn.(2d) 191.

It can scarcely be said that the trial court's finding that there was disability for the period from August 13, 1945 to March 2, 1946 was without evidentiary support and manifestly erroneous.

It has been said that the findings of fact will not be disturbed unless clearly contrary to and in utter disregard of the evidence (*The Redwood and Sun-d'E*, 81 F.(2d) 680 (C.C.A. 9th) and the opinion of the trial court on opinion evidence is especially persuasive (*The Advance*, 43 F.(2d) 824 (C.C.A. 2nd, 1930). What seems to appellee unjustified is the trial court's finding that benefits should cease March 2, 1946. Under the applicable legal tests benefits should be paid for the additional period from March 2, 1946 to August 15, 1947.

CONCLUSION

For the foregoing reasons we respectfully submit that the trial court's finding of disability extending to March 2, 1946, should not be disturbed. We further respectfully submit that the decree of the trial court should be modified to grant recovery for the period from March, 2, 1946 to August 15, 1947.

Respectfully submitted,

BASSETT & GEISNESS,
Proctors for Appellee.